SEP 21 2000

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Juan Vargas	)	MUR 4742
Vargas for Congress '96 and	)	
Deanna Liebergot, as treasurer	)	
Larry Remer, Owner, The Primacy Group	)	

GENERAL COUNSEL'S REPORT #3

I. ACTIONS RECOMMENDED: Find probable cause to believe that Juan Vargas; The Primacy Group and Larry Remer, Owner; and Vargas for Congress '96, and Deanna Liebergot, as treasurer, violated the Act, and approve the attached conciliation agreement.

II. BACKGROUND

This matter was generated by a complaint filed by Derrick Roach, treasurer for the David Gomez for San Diego City Council Campaign Committee, against Mr. Gomez' opponent in the 1998 San Diego City Council race, City Council member Juan Vargas. Mr. Vargas was an unsuccessful candidate in the Democratic primary for the United States House of Representatives in 1996. The complaint dealt, *inter alia*, with the relationship between Mr. Vargas' authorized committee for the 1996 Federal race, Vargas for Congress '96 (with its treasurer, Deanna Liebergot, collectively, "the Committee"), and its primary vendor, the unincorporated political consulting firm The Primacy Group, solely owned by Larry Remer (collectively, "Primacy").

On April 27, 1999, the Federal Election Commission ("the Commission") found reason to believe that Mr. Vargas, the Committee and Primacy violated 2 U.S.C. § 441a in connection with a $24,506.07 debt to Primacy incurred by Mr. Vargas and the Committee pursuant to a consulting contract during the 1996 congressional campaign, which remained unpaid from March 1996 until August 1999. The bases for the reason to believe findings were the determinations that Primacy had not pursued collection of the debt in a commercially reasonable manner, resulting in excessive contributions given by Primacy and accepted by Mr. Vargas and the Committee. On November 30, 1999, the Commission found further reason to believe that the Committee violated 2 U.S.C. § 434(b) by misreporting the debt in Commission filings.[1]

Also on November 30, 1999, the Commission determined to offer to enter into negotiations directed towards reaching conciliation agreements in settlement of this matter prior to a findings of probable cause to believe, and approved three separate agreements for The Primacy Group/Larry Remer, Juan Vargas, and Vargas for Congress '96 and Deanna Liebergot, as treasurer. At that time, the violations of section 441a were expanded to include the apparent extension of credit outside of the ordinary course of business through the consulting contract which deferred the payment of most of Primacy's retainer until the end of the campaign. Conciliation efforts were unsuccessful.

On July 13, 2000, a General Counsel's Brief was issued to all Respondents, who are represented by the same counsel. On July 27, 2000, this Office received a request for an extension of time until September 15, 2000 in which to respond to the General Counsel's Brief, citing preparation for an upcoming trial and the availability of his clients as the good cause necessitating the extension. Counsel signed an agreement tolling application of the statute of

[1] The Commission also originally found reason to believe that Juan Vargas violated 2 U.S.C. §§ 441a, 441b(a) and 441a(f) in connection with serious allegations that Mr. Vargas' 1998 city council re-election committee violated the Act by paying excessive amounts to Primacy as a means of reducing the $24,500 debt owed by the Committee to Primacy for work performed for Mr. Vargas' unsuccessful 1996 House campaign. *See* First General Counsel's Report at 2, 5 and 9. On November 30, 1999, the Commission determined to take no further action regarding these alleged violations because the investigation in this matter produced evidence showing that the allegations were unsubstantiated. *See* General Counsel's Report #2 at 12-15.

limitations for the period of the requested extension, and the extension was granted.[2] The Respondents' "letter brief," in response to the General Counsel's Brief, was received by the Commission on September 18, 2000.

III. ANALYSIS (The General Counsel's Brief dated July 13, 2000 is incorporated herein by reference)

Respondents deny that Primacy's extension of credit to the Federal Committee was outside of the ordinary course of business, and deny that Primacy failed to take commercially reasonable steps to collect the debt owed by the Federal Committee. The Federal Committee also denies that it failed to accurately report the debt that it owed to Primacy.

A. Primacy's Extension of Credit

Respondents argue that the extension of credit was negotiated at arms-length in the ordinary course of business. Regarding the issue of whether there was an arms-length transaction, Respondents assert that "just because two parties may know and respect each other does not mean that a contract between them is not an 'arms-length' transaction." Respondents assert that the General Counsel's Brief took two phrases of Mr. Remer's support for Mr. Vargas out of context. Specifically, Respondents assert that the acknowledgment that Mr. Remer and his wife are supporters and friends of Mr. Vargas was made in response to an inquiry regarding the contributions by both Mr. Remer and his wife to the Vargas Committee in November 1998 -- three years after the contract was entered into. Respondents further assert that when counsel stated that "consultants may even allow their own personal and political views to influence the

---

[2] As a result of the tolling agreement, the first statute of limitations date for one of the excessive contributions is November 10, 2000. The statute of limitations date for the second excessive contribution has no certain date as it is based on failure to pursue a debt in a commercially reasonable manner, but would likely not expire before sometime next year. The reporting violation, which began January 31, 1997, continues to this day as the Committee has not ever amended its erroneous reports.

fees they are prepared to charge a given candidate," counsel was presenting factors that might, as a "general matter," enter into negotiations between candidates and political consultants, not addressing the Vargas/Remer relationship specifically, nor their relationship in the 1996 House race.

In defending the deferred compensation agreement, Respondents for the first time allege a benefit to Primacy. According to Respondents, "there can be tax benefits from deferring a portion of the payment until later in time, spreading the payments out over two different tax years or simply until later in the same year."[3]

Respondents further state that, "[m]ore importantly ... the financial success of the consultant is tied to the political success of the candidate," and that Primacy stood to make much more money if Vargas won the primary election: the win bonus, plus the additional earnings from running the general election campaign, as well as future campaigns on behalf of the successful candidate. Accordingly, it was better to spend money on communicating with the voters rather than putting money in the consultant's pocket. Respondents state that, "[f]rom Primacy's perspective, then – and especially with a client like Mr. Vargas who could be assured of ultimately paying off any debts that were incurred – it made complete economic sense for Mr. Remer to agree to defer a significant portion of his consulting fees."

Respondents further allege that such deferred compensation arrangements are commonplace in the political consulting business. With Primacy, "this typically takes the form of [Primacy] billing the campaign for its monthly retainer while knowing full well . . . that the

[3] Counsel also points out the benefits of the delayed payment arrangement to the Vargas Committee.

bill will not be paid (and is not required to be paid) until some 30, 60 or 90 days later, after the fundraising has caught up with the cash demands of the campaign."

Respondents have submitted two "sworn declarations" from political consultants in the San Diego area which, Respondents assert, confirm that the terms of the Committee/Primacy agreement are commonplace.[4] The declaration from Thomas C. Shepard of Campaign Strategies, Inc. states that "I have witnessed and been party to a number of agreements between candidates and consultants that involved a graduated retainer schedule in which the initial monthly retainer was increased during the course of the campaign. Such arrangements are based on the recognition that some campaigns have limited resources during their early stages and greater resources as the election date appears." Consultant Bobby G. Glaser of The La Jolla Group states that, "[f]or the record, the use of deferred compensation, bonuses, and time payments are frequently used in many, if not most campaigns." He concludes that "the deferred compensation agreement between Mr. Vargas, Mr. Remer and The Primacy Group is wholly within the norm for the political consulting industry."

This Office does not believe that Respondents have adequately demonstrated that the Committee/Primacy agreement was negotiated in the ordinary course of business. While persons who like and respect each other can negotiate arms-length contracts, the subjectivity element is secondary to the objective assessment of the actual contract negotiated. Here, that the terms of the contract were exceedingly generous to the Committee is apparent from the face of the contract. Although Respondents can claim that the consideration of political support and respect for a candidate's beliefs were not referring in context to the Vargas/Remer relationship, it is

[4] Each statement is entitled an "affidavit" and each states at the bottom that it has been "sworn under penalty of perjury." However, neither has been notarized.

undisputed that the two men are friends and that Mr. Remer and his wife made political contributions to the Committee. Those facts, while secondary to the actual terms of the contract, are still relevant to the issue of whether there was an arms-length transaction.

Respondents' new claim that the contract might have tax benefits for Primacy is weak. First, given that the debt was less than $25,000, any tax consequences were likely very minimal. Moreover, the contract contemplated that, at the very latest, the payments were to be paid 180 days after the primary – which would have occurred in the same calendar year. Moreover, while Respondents note that a client like Mr. Vargas "could be assured of ultimately paying off any debts that were incurred," the record is not so clear that this was a foregone conclusion.

Additionally, as described by Respondents, the typical Primacy deferred compensation arrangement extended payment 30-90 days. At the outset, the agreement with Vargas started out by deferring part of the retainer for a minimum of 120 days, already beyond Primacy's normal grace period. Other amounts were deferred for as much as 300 days. Moreover, Respondents have acknowledged that Primacy has never before entered into a written agreement setting forth this kind of arrangement, and admit that such arrangements are usually made on an *ad hoc* basis after Primacy has begun its services to the client. That the contractual provision deferring payment was unique to the Vargas campaign further demonstrates that the contract was not made in the ordinary course of business.[5] Indeed, as noted in the General Counsel's Brief,

[5] Respondents state that the reason the deferral provision was expressly included in the contract was because Mr. Remer "wanted to reassure Mr. Vargas that he did not have to worry about using whatever money he was able to raise early in the campaign to pay his political consultants, but that this money could instead be used for efforts to raise Mr. Vargas' profile and, in turn, assist both with fundraising and in the political campaign." However, Mr. Vargas has been described as a "longtime" client of Mr. Remer, and surely would have known "from prior experience" that payments could be deferred.

Commission regulations expressly hold that the "terms of any credit extended must be substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation." 11 C.F.R. § 116.3(a). While Primacy is a political consultant, and thus it is unlikely to have many nonpolitical debtors with which to draw comparisons, it appears that the terms of the agreement between Vargas and the Committee were not even substantially similar to extensions of credit to Primacy's other *political* debtors.

Nor do the statements by the two other political consultants substantially aid Respondents' cause. Mr. Shepard merely states that he has been party to agreements where the intial monthly retainer has been increased over time. Here, there were no graduated payments, the amount of the retainer stayed the same, and the amount actually paid monthly stayed the same. Thus, there is no comparison between what Mr. Shepard regards as appropriate, and the Committee/Primacy agreement. Furthermore, this Office does not disagree with Mr. Glaser that the use of deferred compensation, bonuses and time payments are a part of many contracts in campaigns. However, it is the total package of such benefits to the campaign that makes the difference between a contract in the ordinary course of business and an excessive contribution. While Mr. Glaser concludes that the deferred compensation agreement at issue here is "wholly within the norm for the political consulting industry," there is nothing in his statement that indicates that he read the agreement, has studied other contracts in the industry, or that, as a consultant for clients running for state and local office, that he is familiar with agreements in the federal political area. Tellingly, neither the Respondents, nor the two other political consultants, have provided copies of any other contracts, redacted or otherwise, to support their claims.

B. Pursuit of the Debt

Regarding the issue of Primacy's pursuit of the debt owed to it, Respondents state that Mr. Vargas tried to raise funds throughout 1996 in order to pay off his debt, but was unsuccessful, at which time the parties agreed to hold off on trying to raise funds and decided to concentrate on raising Mr. Vargas' profile so that he could ultimately succeed in raising funds. Respondents assert that the soundness of this course of action is demonstrated by the fact that Vargas did eventually pay off the debt.

Respondents also assert that the filing of a lawsuit in order to recover payment would not only have ensured that Primacy was not repaid, but would have guaranteed that Primacy never worked for Vargas, or possibly in the industry, again. According to Respondents, political consultants have few reasonable alternatives other than to wait and assist the candidate in raising money in order to pay off the debt. Respondents further argue that because Primacy had other clients whom it allowed to take time to pay off their debts, regardless of the substantial differences in amount or timespan with the present case, this demonstrates a consistent strategy and practice on Primacy's part to allow a candidate sufficient time to pay off a debt.

Respondents also cite to the statement of Mr. Glaser, in which he acknowledges that a consultant has the ability to sue a non-paying client, but if he does, "you will have a great deal of trouble gaining the trust and confidence of your next client." According to Mr. Glaser, "your only option is to work with your client, and take payment over time. I have had to accept this reality more often than I would like to admit." Mr. Glaser further states, "Interestingly, with patience, I have always been paid. Candidates want to pay their debt. It just takes longer to raise money if you are not the frontrunner, or worse, if you lose." Respondents then cite to a number of committees which have reported debts for an extended period in an effort to demonstrate that the Committee/Primacy situation is reasonable. Among others, they cite large debts owed by the Dole-Kemp '96 General Committee and the debts reported by Friends of John Glenn from former Senator Glenn's 1984 presidential bid, as evidence that the options in collecting a debt "from a losing campaign are limited - both legally and practically."

This Office believes that Respondents have failed to make the case that their pursuit of the debt was "commercially reasonable." This Office finds it commendable that the Committee ultimately paid its debt to Primacy. However, this Office contends that until prompted by the Commission's investigation, Respondents expended insufficient efforts to resolve the debt.

In a May 20, 1999 letter from counsel for Respondents to this Office, responding to the Commission's reason to believe findings, counsel stated that, "although Respondents vigorously deny the allegations of the complaint, Councilman Vargas has indicated a willingness to expend the time and resources necessary to attempt to raise sufficient funds to pay off the remaining [Vargas Committee] campaign debts . . ., thereby allaying the concerns expressed in the General Counsel's [sic] analysis." Although Respondents state in their letter brief that "there was no realistic fundraising potential until 1999 at the earliest," it appears from the statement in the May 1999 letter that, had the Commission not informed Mr. Vargas of the apparent violation, any attempt to raise funds and pay off the debt would have been further delayed.

This Office is not contending that Primacy necessarily should have sued Mr. Vargas, although that was an option.[6] The political consulting industry is not unique in its reluctance to sue recalcitrant clients in fear of offending other current or potential clients. While Respondents

[6] In a joint letter submitted by Messrs. Vargas and Remer, and Ms. Liebergot, on July 1, 1999, Respondents state that"[w]hen [Primacy] and Councilman Vargas signed a contract for consulting services for the '96 Congressional campaign, Councilman Vargas agreed to assume personal responsibility for any and all outstanding debts of the campaign."

cite to one such unsuccessful suit, there are likely others that have been successful.

Moreover, one of the other political consultants relied upon by Respondents does not completely rule out the filing of such a suit. Mr. Shepard states that, "[i]n the past, I have resorted to litigation as a last resort, only under the most intractable circumstances." Mr. Shepard does not state how those instances may have compared with the instant matter, but he does acknowledge that litigation is one way to recover a debt from a political consulting client.[7] And while this Office is mindful of the need for people in all manner of businesses to maintain good relations with clients and customers, this Office is also mindful that any business that does not collect payments from its customers for three years will not be in business for long.

With respect to other committees with long-standing debts, the facts and circumstances of those situations are not before the Commission. Here, the complaint alleged an excessive contribution growing out of a failure to collect the debt. The Commission found reason to believe that a violation had occurred. This Office investigated the situation and found the allegation to be meritorious.[8]

---

[7] As noted *supra*, while Mr. Glaser acknowledges that political consultants can legally sue clients, he asserts that it is not a practical option. Mr. Glaser does make an interesting statement, though. In trying to justify the leniency provided to Mr. Vargas, he states that "I am confident that bank presidents, holding non-performing mortgagees, would tell you that they do not intend to make a donation to the debtor." While this is undoubtedly true, it is also unlikely that a bank is going to allow a mortgagee to not pay anything for three years before it decides to foreclose or establish a payment schedule. Further, that bank is unlikely to provide any further funding to the non-paying mortgagee. This stands in sharp contrast to Mr. Remer, who, after enduring a substantial period of non-payment, gave a contribution to the Vargas Committee. The Committee used that contribution (as well as one from Mr. Remer's wife) to pay back a loan provided to it by Mr. Vargas.

[8] With regard to Friends of John Glenn, because that was then-Senator Glenn's authorized committee for his 1984 presidential run, and because that committee accepted matching funds, Senator Glenn himself was unable to contribute more than $50,000 to his campaign, *see* 26 U.S.C. § 9035, and thus could not assist in its debt reduction, until the Commission's action in Advisory Opinion 1993-19. As a House candidate, Mr. Vargas was under no such restriction in assisting his committee in reducing its debt. *See* 11 C.F.R. § 110.10(a) (except for certain instances not applicable here, "candidates for Federal office may make unlimited expenditures from personal funds.") It was up to Mr. Remer, in the course of deciding whether to advance approximately $25,000 in services to the Vargas Committee, for which Mr. Vargas would be personally liable, to determine whether such a course of action was prudent from a business standpoint.

Respondents also take issue with the allegation that Mr. Vargas and the Vargas Committee violated the Act by accepting the excessive contributions. Respondents seem most concerned with the language in the statute that states that such action must be done in a knowing manner, and appear to suggest that this Office is taking the position that their actions were knowing and willful, which they were not. The knowing standard, which is part of section 441a(f), "does not require knowledge that one is violating a law, but merely requires an intent to act." *FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 986-7 (D.N.J. 1986). That latter precondition is satisfied here.

C. Reporting Violations

Respondents also object to the finding that the Committee failed to properly report the deferred compensation obligation, describing it as a "last minute add-on." Respondents state that, aside from the $1,000 payments that Primacy would be receiving monthly beginning in October 1995 . . ., the first date upon which Primacy was entitled to receive any other money from the Committee was March 1, 1996. At that point, the Committee was obligated to pay Primacy an additional $6,000 unless the parties agreed, as they did, that the campaign could not afford to make such payment without significantly harming the campaign effort." Respondents argue that this Office has mistakenly based the reporting violation on 11 C.F.R. § 104.11(b), because the Committee was "fully justified in relying on section 104.11(b) in treating the payments due to Primacy as 'regularly reoccurring' expenses and first reporting them as a debt only upon the earliest possible payment due date in March 1996, not back in October 1995."

Respondents further argue that, even if Primacy did not report the debt correctly, the Commission should not make probable cause to believe findings because "[t]here was no intent to deceive anyone and . . . the voters were not deprived of any meaningful information regarding the financial strength of the Committee." According to Respondents, "Primacy's role and involvement with the campaign was reported in connection with the monthly $1,000 payments and additional expense reimbursements that it was receiving throughout the reporting periods, and the Committee's finances were not materially affected by the additional $18,000 that the General Counsel's office contends should have been reported earlier." Respondents believe that any such "infraction," if it exists, is "minor" and "technical".

Contrary to Respondents' contention, the reporting violation is not a "last minute add-on." Respondents have been aware of the Commission's reason to believe finding concerning the Committee's reporting since December 1999. Further, since the written contract obligated the Committee to expend amounts over $500 during the life of the contract, the obligation accrued on the date of the contract, and the debt should have been reported contemporaneously with paydowns reported in subsequent reports. *See* 11 C.F.R. § 104.11(b).

It is Respondents who mistakenly rely on 11 C.F.R. § 104.11(b), which allows delayed reporting up until the payment due date for "regularly reoccurring *administrative* expenses." (emphasis added). According to the contract, however, Primacy was being paid for "[d]evelopment of a campaign plan, which [included] a Theme, Message, Strategy and Budget." Quite simply, these are not administrative expenses.

Whether Respondents had any intent to deceive is immaterial as to whether a reporting violation has occurred. Again, this Office has not suggested that the Commission make a knowing and willful finding, only that the Commission find probable cause to believe that a reporting violation has occurred.[9] Moreover, contrary to Respondents' assertions, a reporting violation which obscures the public's view of the financial solvency of a campaign during the primary election period is neither "minor" nor "technical." Accurate reporting in a timely manner of campaign finances is at the heart of the Act. Here, the public was entitled to know that the Committee was carrying debt that, by Respondents' figures, comprised approximately 10 percent of the Committee's expenditures.

D. Conclusion

Based on the above, this Office recommends that the Commission find probable cause to believe that The Primacy Group and Larry Remer, Owner, violated 2 U.S.C. § 441a; that Juan Vargas, Vargas for Congress '96, and Deanna Liebergot, as treasurer, violated 2 U.S.C. § 441a(f); and that Vargas for Congress '96, and Deanna Liebergot, as treasurer, violated 2 U.S.C. § 434(b).

IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

[9] Respondents argue that, instead of the Commission finding probable cause, "at worst," the Committee's reports should be amended to properly reflect what should have been reported. However, such a requirement is appropriate after a finding of probable cause to believe, in the context of a conciliation agreement. Moreover, the Committee could have voluntarily amended its reports at any time since December 1999, and has not.

V. RECOMMENDATIONS

1. Find probable cause to believe that The Primacy Group and Larry Remer, Owner, violated 2 U.S.C. § 441a.

2. Find probable cause to believe that Juan Vargas, Vargas for Congress '96, and Deanna Liebergot, as treasurer, violated 2 U.S.C. § 441a(f).

3. Find probable cause to believe that Vargas for Congress '96, and Deanna Liebergot, as treasurer, violated 2 U.S.C. § 434(b).

4. Approve the attached conciliation agreement and appropriate letter.

9/21/00
Date

Lawrence M. Noble
General Counsel

Attachment:
1. Conciliation Agreement

Staff assigned: Tony Buckley